

CHAPTER 59-02 TRUSTS FOR THE BENEFIT OF THIRD PERSONS

59-02-01. Application of chapter. The provisions of this chapter apply only to express trusts, created for the benefit of one other than the trustor, and in which the title to the trust property is vested in the trustee, not including, however, those of executors, administrators, and guardians as such.

59-02-02. Mutual consent of trustor and trustee necessary. The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission.

59-02-03. When court trustor. When a trustee is appointed by a court or public officer as such, such court or officer is the trustor within the meaning of section 59-02-02.

59-02-04. Declaration of nature of trust. The nature, extent, and object of a trust are expressed in the declaration of trust. All declarations of a trustor to the trustor's trustees in relation to the trust before its acceptance by the trustees, or by any one of them, shall be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein.

59-02-05. Trustee shall obey declaration of trust. A trustee must fulfill the purpose of the trust as declared at its creation and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner and to the same extent as an employee.

59-02-05.1. Investment of trust funds in mutual funds. Notwithstanding section 59-02-05, instead of investments specified in the trust, a trustee, unless expressly prohibited by the trust, may invest trust funds in shares of investment companies that are registered under the Investment Company Act of 1940, as amended, and which invest in the investments specified in the trust. If the investments specified in the trust are direct obligations of the United States government or obligations issued by agencies of the United States, the investments may be made in the form of securities or other interests in an open-end management type investment company or investment trust registered under the Investment Company Act of 1940, as amended, if the portfolio of the investment company or investment trust is limited to United States government obligations and repurchase agreements fully collateralized by United States government obligations and the investment company or investment trust takes delivery of the collateral directly or through an authorized custodian.

59-02-06. Ordinary care by trustee required. Repealed by S.L. 1973, ch. 257, § 82.

59-02-07. Appointment of successor to trustee. If a trustee procures or assents to discharge from the trustee's office before the trust is fully executed, the trustee must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting the trustee's own final discharge.

59-02-08. Investment of trust funds - Prudent investor rule. Repealed by S.L. 1997, ch. 508, § 3.

59-02-08.1. Prudent investor rule.

1. Except as otherwise provided in subsection 2, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in sections 59-02-08.1 through 59-02-08.11.
2. The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary

to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

59-02-08.2. Standard of care - Portfolio strategy - Risk and return objectives.

1. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
2. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
3. Among circumstances a trustee shall consider in investing and managing trust assets are any of the following that are relevant to the trust or its beneficiaries:
 - a. General economic conditions;
 - b. The possible effect of inflation or deflation;
 - c. The expected tax consequences of investment decisions or strategies;
 - d. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
 - e. The expected total return from income and the appreciation of capital;
 - f. Other resources of the beneficiaries;
 - g. Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
 - h. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
4. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
5. A trustee may invest in any kind of property or type of investment consistent with the standards of sections 59-02-08.1 through 59-02-08.11.
6. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

59-02-08.3. Diversification. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

59-02-08.4. Duties at inception of trusteeship. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of sections 59-02-08.1 through 59-02-08.11.

59-02-08.5. Loyalty. A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

59-02-08.6. Impartiality. If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

59-02-08.7. Investment costs. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

59-02-08.8. Reviewing compliance. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

59-02-08.9. Delegation of investment and management functions.

1. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
 - a. Selecting an agent;
 - b. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
 - c. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
2. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
3. A trustee who complies with the requirements of subsection 1 is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
4. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

59-02-08.10. Language invoking standard of sections 59-02-08.1 through 59-02-08.11. The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under sections 59-02-08.1 through 59-02-08.11: "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule".

59-02-08.11. Application to existing trusts. Sections 59-02-08.1 through 59-02-08.11 apply to trusts existing on and created after August 1, 1997. As applied to trusts existing on August 1, 1997, sections 59-02-08.1 through 59-02-08.11 govern only decisions or actions occurring after that date.

59-02-09. Claims purchased by trustee not enforceable. A trustee cannot enforce any claim against the trust property which the trustee purchases after or in contemplation of the

appointment as trustee, but the trustee may be allowed by any competent court to charge to the trust property what the trustee has in good faith paid for the claim upon discharging it.

59-02-10. Authority of trustee. A trustee is a general agent for the trust property. The trustee's authority is such as is conferred upon the trustee by the declaration of trust, by this title, and by title 30.1. The trustee's acts, within the scope of the trustee's authority, bind the trust property to the same extent as the acts of a general agent bind a principal.

59-02-11. All cotrustees must act in unity. When there are several cotrustees all must unite in any act to bind the trust property, unless the declaration of trust provides otherwise.

59-02-12. Discretionary power of trustee - How exercised. A discretionary power conferred upon a trustee is not presumed to be left to the trustee's arbitrary discretion, but is controlled by the district court if not reasonably exercised, unless an absolute discretion clearly is conferred by the declaration of trust.

59-02-13. Instruments executed by trustee in representative capacity - Effect. Whenever any trustee, in the course of the administration of a trust, shall execute any deed, mortgage, bill of sale, or other instrument affecting real or personal property belonging to said trust, and proper recitals shall appear in such instrument showing that it was executed by said trustee solely in the trustee's representative capacity as trustee, such instrument shall be binding only upon said trustee in the trustee's representative capacity, and shall create no personal liability against the person, firm, corporation, or limited liability company executing such instrument.

59-02-14. Trustee's expenses paid out of trust estate. A trustee is entitled to the payment out of the trust property of all expenses actually and properly incurred by the trustee in the performance of the trustee's trust. The trustee is entitled to the repayment even of unlawful expenditures if they were productive of actual benefit to the estate.

59-02-15. Compensation of trustee. A trustee is entitled to reasonable compensation for services. If the declaration of trust provides for compensation of the trustee and there is no contract with the settlor regarding compensation, the trustee may renounce the provision before the trustee voluntarily assumes the relation of personal confidence with another deeming the person a trustee or before accepting appointment under the provisions of chapter 59-04 and be entitled to reasonable compensation. A trustee also may renounce the trustee's right to all or any part of the compensation. A written renunciation of fee may be filed with the district court in which the trust is registered.

59-02-16. No compensation to implied trustees. The trustee of an implied trust who becomes such through the trustee's own fault has none of the rights to compensation or repayment of expenses prescribed in sections 59-02-14 and 59-02-15.

59-02-17. Trusts - How terminated. A trust is extinguished by the entire fulfillment of its object or upon its object becoming impossible or unlawful.

59-02-17.1. Suspension of power of alienation - Rule against perpetuities - Exception. A trust created by an employer as part of a stock bonus, pension, disability, death benefit, or profit-sharing plan for the benefit of some or all employees, to which contributions are made by the employer or employees for the purpose of distributing to the employees the earnings or the principal of the fund held in trust, shall not be deemed invalid as violating any existing law or rule of law against perpetuities or suspension of the power of alienation of the title to property; but such trust may continue for such time as may be necessary to accomplish the purposes for which it was created.

59-02-18. Trust not revocable - Exception. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, without the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

59-02-19. Office of trustee - How vacated. The office of a trustee is vacated:

1. By the trustee's death; or
2. By the trustee's discharge.

59-02-20. Discharge of trustee. A trustee can be discharged from the trustee's trust only as follows:

1. By the extinction of the trust;
2. By the completion of the trustee's duties under the trust;
3. By such means as may be prescribed by the declaration of trust;
4. By the consent of the beneficiary, if the beneficiary has capacity to contract;
5. By the judgment of a competent tribunal, in a direct proceeding for that purpose, that the trustee is of unsound mind; or
6. By the district court.

59-02-21. Trust survives to cotrustees. On the death, renunciation, or discharge of one of several cotrustees the trust survives to the others.

59-02-22. Private foundations - Charitable trusts - Split-interest trusts.

1. Any will or trust instrument creating a trust which is a "private foundation", as defined in section 509(a) of the Internal Revenue Code of 1954, or a "charitable trust", as defined in section 4947(a)(1) of the Internal Revenue Code of 1954, or a "split-interest trust", as defined in section 4947(a)(2) of the Internal Revenue Code of 1954, and any other instrument governing the trustee of any such trust, or the use, retention, or disposition of any of the income or property of such trust, shall be deemed to have incorporated within such will, trust instrument, or other governing instrument, with the same effect as though such language were set forth verbatim in such will, trust instrument, or other governing instrument, the following provisions with respect to such trust and the trustee thereof, and, except as the contrary is provided in subsection 2, such provisions shall govern the administration and distribution of any such trust, irrespective of any provisions of any applicable will, trust instrument, or other governing instrument, statute, or law of this state to the contrary:
 - a. The trustee shall distribute for each taxable year of the trust amounts at least sufficient to avoid liability for the tax imposed by section 4942(a) of the Internal Revenue Code of 1954, as now enacted or as hereafter amended.
 - b. The trustee shall not engage in any act of "self-dealing", as defined in section 4941(d) of the Internal Revenue Code of 1954, which would give rise to any liability for the tax imposed by section 4941(a) of the Internal Revenue Code of 1954.
 - c. The trustee shall not retain any "excess business holdings", as defined in section 4943(c) of the Internal Revenue Code of 1954, which would give rise to any liability for the tax imposed by section 4943(a) of the Internal Revenue Code of 1954.
 - d. The trustee shall not make any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the Internal Revenue Code of 1954, so as to give rise to any

liability for the tax imposed by section 4944(a) of the Internal Revenue Code of 1954.

- e. The trustee shall not make any "taxable expenditure", as defined in section 4945(d) of the Internal Revenue Code of 1954, which would give rise to any liability for the tax imposed by section 4945(a) of the Internal Revenue Code of 1954.
2. Subsection 1 shall not apply to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the will, trust instrument, or other governing instrument described in subsection 1 and that such will, trust instrument, or other governing instrument may not be changed to conform to subsection 1.
3. As used in this section, "trustee" means a corporation, individual, or other legal entity acting as an original, added, or successor trustee of a testamentary or inter vivos trust estate. Any reference to a particular section of the Internal Revenue Code of 1954 herein shall mean and include, as now enacted or as hereafter amended, such section and any provision of federal law as is or may hereafter be applicable, cognate to such section.
4. Nothing in this section shall impair the rights and powers of the attorney general or the courts of this state with respect to any trust.